85-201

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JEFFREY LOVINGER, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Appellate Court's determination that a mistrial declared *sua sponte* by the trial judge can be treated on appeal as a mistrial declared on motion of the defendant because the defendant had, at a prior point in the trial, made a mistrial motion on different and factually unrelated grounds, is contrary to the fundamental principles of the Fifth Amendment's prohibition against double jeopardy in that it allows a defendant to be subjected to a second trial even though there was no manifest necessity for a mistrial and even though the defendant had no input on the judge's decision to abort the first trial?

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I. Certiorari should issue to review the novel holding of the Illinois Appellate Court treating a mistrial declared sua sponte by the trial judge as one made on Petitioner's motion because of a prior unsuccessful mistrial motion made by Petitioner on different grounds. By authorizing retrial despite the fact that Petitioner was afforded absolutely no input on the decision to abort the original mistrial and despite the fact that he entered an objection to the mistrial after it was announced, the Illinois Appellate Court's holding defies the fundamental premise of the double jeopardy clause guaranteeing to a criminal defendant the right to proceed to verdict before the original trier of fact unless prosecutorial or judicial error manifestly necessitates a mistrial.

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The petitioner, Jeffrey Lovinger, prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court affirming the denial of his motion to bar retrial after his original bench trial was aborted on motion of the court.

OPINION BELOW

The opinion of the Illinois Appellate Court was filed on January 17, 1985. People v. Lovinger, 130 Ill.App.3d 105, 473 N.E.2d 980 (2nd Dist., 1985). A copy of the opinion is attached hereto as Appendix A. A Petition for Leave to Appeal to the Illinois Supreme Court was denied on June 4, 1985. A copy of the order denying the Petition appears in Appendix B.

JURISDICTION

This petition is being filed within sixty days of the June 4, 1985 order of the Illinois Supreme Court denying the Petition for Leave to Appeal the holding of the Appellate Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257. See Harris v. Washington, 404 U.S. 55 (1971).

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CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jeffrey Lovinger was charged in three counts with the offense of unlawful delivery of cocaine and cannabis. (C. 7-8) At the bench trial on those charges, three agents testified about two transactions during which Lovinger allegedly sold four packages of white powder and one bag of a green leafy substance to one of the agents. (R. 14-60, 73-92, 182-189, 212-223)

Substantial evidence was adduced concerning the processing of the various packages and the chain of custody on the exhibits from the time of the transactions until the packages were delivered to the crime lab for testing and thereafter. During testimony on those matters, one of the agents acknowledged that pursuant to the court's order directing that samples

from the exhibits be delivered to an independent chemist for testing, she had removed a sample from only one of the three packets comprising People's Exhibit No. 2. (R. 60-62) The judge then recessed the proceedings so that the defense chemist could test samples from all three packets. (R. 64)

When proceedings resumed several months thereafter, the crime lab chemist testified that he received one bag of white powder (People's Exhibit No. 1) from Officer Tom Hutchings on October 19, 1979, and three packets of white powder (People's Exhibit No. 2) and one package of a green leafy substance (People's Exhibit No. 3) from Officer Michael Bowden on October 17, 1985. His tests on the exhibits led him to conclude that the powder found in No. 1 contained cocaine, that the powder found in each of the three packets in No. 2

weighed, in total, 83.15 grams and contained cocaine, and that the green leafy substance in No. 3 contained cannabis. (R.234-282)

Hutchings, who was the Waukegan police officer in charge of the evidence room, testified next, describing in detail the chronology of his dealings with each of the exhibits, including the dates on which they came into and left his possession and the persons who brought them to him and took them away. (R. 401 et. seq.) At one point, Hutchings testified that People's Exhibit No. 1 was constantly in his possession from September 14, 1982 until November 18, 1982. (R. 401-225) Subsequently, he testified that he released the exhibit to an investigator for the State's Attorney on November 4, 1982. (R. 439) The prosecutor then asked several questions concerning

Hutchings' original assertions, prompting the judge to interrupt and observe that the prosecutor was being repetitious. The prosecutor said he was only trying to correct the witness' testimony, but the judge suggested that the prosecutor was actually developing inconsistent testimony and creating two conflicting chains of custody. The judge also suggested that the prosecutor was trying to impeach his own witness. Pursuant to the prosecutor's protestations that he was only trying to clarify, the court declared a recess so that the prosecutor could "get [his] act together." (R. 439-450)

After the recess, defense counsel objected that the prosecutor had been talking to the witness and passing papers back and forth. Counsel alleged his belief, without being able to know the substance of the communications,

that the witness' testimony would be tainted by the apparent attempt to coach the witness through his difficulties. (R. 451-453) The prosecutor informed the judge that pursuant to the judge's direction to get his act together, he had talked with Hutchings, but first told him he could not discuss his testimony. He then asked to see Hutchings' records, told Hutchings to review the records, and told him to testify from his memory. He did not tell Hutchings how to testify. (R. 453)

Judge Hoogasian found that the prosecutor had acted improperly, but that no harm had come of the conversation since the witness had only been referred to his records and since he had been testifying from the records throughout direct examination. The judge directed that there be no further conversation, and said that if there was

a motion for mistrial, it was denied.

(R. 454-456)

The following then occurred:

MR. WILL: Judge, let me make a few motions.

THE COURT: And if there is error, if there is any error, is merely harmless at this time. And your record is preserved for anything you may decide to do in the future.

MR. WILL: Judge, I'm doing this behind you, but give me a few quick rulings. Number one, I move his testimony be stricken in its entirety, for the reasons that I expressed earlier. This conversation, Judge, took place about 10 minutes, and while they may have been going over some paper we have been using in open court, I still believe there is a great possibility he was pointing out to him some mistakes and things like that, that had to be cleared up in a way that could be done properly on the stand without objection.

THE COURT: Well, I just asked Mr. McCullom, and Mr. McCullom said that is not the case. Am I correct, Mr. McCullom?

MR. McCULLOM: That is correct, Judge. I was

pointing out what his records reflect. I'm not telling him to lie.

THE COURT: That motion is denied for the reasons I mentioned. What else?

MR. WILL: The second motion is he be precluded from testifying further in this matter. I so move because of the impropriety.

THE COURT: Denied.

MR. WILL: Then, Judge, finally, I move for the mistrial you suggested.

THE COURT: I denied that and I didn't suggest one. I merely went through the entire explanation so the record would be complete. (R. 456-457)

On continued direct examination and after looking at his records several times, Hutchings testified that he had released People's Exhibit No. 1 to an assistant State's Attorney on November 3, 1982, and that the exhibit was returned to him by the State's Attorney's investigator on November 9,

1982. (R. 460-465) The following day, Hutchings again gave inconsistent accounts of the travels of another exhibit, prompting the judge to interject:

> Gentlemen, I'll tell you something. The record speaks for itself. You know, Friday, prior to we leaving, I suggested to both of you, you know, what this record is. This record has got evidence going out and never returning. The record has got the evidence, the same evidence going out twice, never returning the first time. There is confusion. There is -- and you know we got into the question at that time and you said you could impeach your own witness, and I'm not going to get into the semantics and so forth. But it's your record. It's your case. (R. 502)

As Hutchings' testimony on direct proceeded, the court sustained defense objections to the prosecutor's attempts to reclarify, as well as to examination that did not conform to the procedures

for refreshing recollection. (R. 503-506)

On cross-examination, Hutchings described the physical layout and procedures of the evidence area. Evidence was stored in boxes on moveable shelves in a room to which only Hutchings and the Deputy Chief of Services had keys. That room was kept locked whenever Hutchings was not inside, before, during, or after his 8:00 A.M. to 4:00 P.M. shift. Next to the booking room, there was a battery of lockers used by officers to deposit evidence when Hutchings was not on duty. Each locker had two keys. One was kept in Hutchings' office. The other remained in the lock until an officer deposited evidence in a particular locker; he would then lock that locker, remove the key and deposit it in a slot in another locker. When Hutchings

reported for duty, he would remove the keys from that locker and then retrieve articles left in the evidence lockers which those keys opened. Hutchings then took all of the evidence to his office (the evidence room), logged it in, and placed it in an appropriate box. (R. 538-541)

Pursuant to defense counsel's request, the court recessed proceedings so that the parties could retrieve and examine the log book kept by Hutchings during the relevant times. (R. 549-550) The court instructed the attorneys not to ask Hutchings any questions about the log outside the courtroom. (R. 550) On further cross-examination, Hutchings testified that the log book indicated that People's Exhibit No. 2 was received in the evidence room on October 17, 1979. He asserted, however, that the entry (which Hutchings himself had made)

was erroneous; the exhibit was not actually received until October 26, 1979. Hutchings did not know why he would have made the erroneous entry, but opined that perhaps Officer Bowden had told him he had taken the exhibit to the crime lab on October 17th. (R. 563-567)

Officer Michael Bowden testified that after the two transactions described by the other agents, the substances delivered by Lovinger were turned over to Bowden. (R. 597-602, 606-613) He brought People's Exhibit No. 1 to the Waukegan Police Department at about 3:00 P.M. on October 15, 1979, and deposited it in a locker. After locking the locker, Bowden retained the key. He then opened the locker the next day, removed the exhibit and delivered it to Hutchings. (R. 603-605) Bowden placed People's Exhibits No. 2 and 3 in an evidence locker on October 16, 1979,

again retained the key, and then removed the exhibits the following day and took them to the crime lab. (R. 613-614)

Bowden gave testimony about his handling of another exhibit that prompted the prosecutor to attempt to refresh Bowden's recollection from records as to the date upon which he actually delivered it to the crime lab. (R. 615-619) A defense objection was sustained, and the court instructed the prosecutor to stop trying to correct his witness' testimony. (R. 619) The judge then recessed until the afternoon, warning the witness not to talk to the lawyers and warning the lawyers not to talk to the witness. (R. 620)

When proceedings resumed, defense counsel complained that during the recess, the prosecutor had conferred with the witness, Bowden. (R. 622) The prosecutor told the judge that he only

asked Bowden if he had some police reports defense counsel had asked about. (R. 622) Bowden was then brought into the courtroom. When asked if the State's Attorney had talked with him at all during the recess, he twice answered, "No," and then said that during the recess, he had told the prosecutor, "I wasn't pleased with the fact that I was getting my butt chewed out. But that was it." (R. 623) Defense counsel asked to have petitioner sworn, and Lovinger then testified that he overheard the prosecutor ask the witness about reports and also something about the key and the evidence locker. (R. 623-627)

The prosecutor again insisted that his only conversation with Bowden involved the reports. There then followed an exchange as to whether the reports were discoverable. Judge

Hoogasian directed the prosecutor to find the reports and bring them to him because, "I'm not going to have any case with any hint of error, and we are starting to have a lot of error creep into this record." (R. 629) The judge also indicated he wanted to review the court reporter's notes of what had transpired. (R. 629)

When the judge took the bench again, he announced that he was declaring a mistrial in the following soliloquy:

> Gentlemen, at this time I want to put something on the record. I have not been satisfied with the way this case has been presented. First, I call to the attention of everybody in this courtroom that because of the laxity of the prior State's Attorney and his administration, there was nothing done to resolve this cause of action before a jury or bench trial because of the fact that this matter had occurred in 1979.
>
> Secondly, I am concered about the lack of discovery

afforded the defense, pursuant to court order of Judge Doran, and even of this court.

Third, there was a failure to fully comply with the orders of the Court during trial regarding discovery. For example, I point to my order of September 7th and the fact that a witness in this cause did remove portions from Group Exhibit No. 2, for identification, when I had ordered all of the exhibits to be taken to the defense chemist for purpose of analysis, pursuant to the order of discovery.

Fourth, I am very much concerned about what occurred early this afternoon in this courtroom. And this can be classified as either direct or indirect contempt, and I'm not going into that phase of it. Because of the talking about a pending matter with a witness who says he did not talk with the Assistant State's Attorney, and the Assistant State's Attorney saying to me that he did not talk with the witness, except for request by Bob Will, representing the defendant, and then you changing your conversation after Lovinger under oath indicated certain things. And then you said something else contrary, and it's all on the record.

At this point in the trial, it is questionable, and I doubt whether discovery has been completed by the State to the defense.

And further it has been disclosed by the witness on the stand, when he said, "I told him I was not pleased with the fact I was getting my butt chewed out, but that was it."

I, as the Court, am wholly unaware of any -- I'm sorry. I am only aware of a reprimand by anyone except my admonition to the witness, to the defense and to the Assistant State's Attorney, not to discuss this case with anyone. And prior to I continuing this matter this morning, I said, "I am going to continue this case to 1:30. You don't talk with them; they don't talk with you about this case. Again, I'm going to advise, let's get everything in order."

I feel error has crept into this trial and it can only be resolved by me declaring a mistrial, which I so order, and I recuse myself from this case, and I order you to appoint another judge. Call the Clerk. And the only other judge that will not take this is Strouse, because he has recused himself before. And after it is assigned to

> another judge, I instruct you to go to the other judge and let him set it for trial. Bond is continued. (R. 630-632)

The transcript indicates that proceeding for that date terminated with the court's comments. (R. 632)

After the case was reassigned to another judge, the defense filed a motion to bar further prosecution, and at the first appearance before the new judge, the defense stated its objection to the mistrial declared by Judge Hoogasian. (C. 121-124) Arguments on the motion to bar retrial centered on whether there was manifest necessity for the mistrial, with the State contending that the mistrial was necessary because Judge Hoogasian apparently believed he could no longer be impartial as a result of what he saw as error occurring. (R. 637-654) During arguments on the motion, defense counsel asserted that he had

been unable to object to the declaration of a mistrial because Judge Hoogasian was walking out the door as he finished his remarks. (R. 644)

Judge McQueen denied the defense motion to bar new trial, finding that there was manifest necessity for the declaration of a mistrial because Judge Hoogasian believed that error had occurred and because, "An error, of course, would destroy a fair trial." (R. 670)

In an opinion filed January 17, 1985, the Appellate Court affirmed and remanded the cause for further proceedings. (Appendix A.) That court declined to decide whether the mistrial was manifestly necessary, determining instead that the mistrial could be characterized as one declared with the defendant's consent since he had previously moved for a mistrial when the

prosecutor conferred with Officer Hutchings during a recess in his testimony and since the defendant did not object, when the judge sua sponte declared a mistrial after the prosecutor conferred with Officer Bowden. As such, the mistrial presented no bar to retrial unless the defendant could show prosecutorial overreaching and, according to the Appellate Court, the defense failed to make that showing. (Appendix A p. 12) The Illinois Supreme Court denied the defendant's Petition for Leave to Appeal on June 4, 1985. (Appendix B)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD ISSUE TO REVIEW THE NOVEL HOLDING OF THE ILLINOIS APPELLATE COURT TREATING A MISTRIAL DECLARED SUA SPONTE BY THE TRIAL JUDGE AS ONE MADE ON PETITIONER'S MOTION BECAUSE OF A PRIOR UNSUCCESSFUL MISTRIAL MOTION MADE BY PETITIONER ON DIFFERENT GROUNDS. BY AUTHORIZING RETRIAL DESPITE THE FACT THAT PETITIONER WAS AFFORDED ABSOLUTELY NO INPUT ON THE DECISION TO ABORT THE ORIGINAL MISTRIAL AND DESPITE THE FACT THAT HE ENTERED AN OBJECTION TO THE MISTRIAL AFTER IT WAS ANNOUNCED, THE ILLINOIS APPELLATE COURT'S HOLDING DEFIES THE FUNDAMENTAL PREMISE OF THE DOUBLE JEOPARDY CLAUSE GUARANTEEING TO A CRIMINAL DEFENDANT THE RIGHT TO PROCEED TO VERDICT BEFORE THE ORIGINAL TRIER OF FACT UNLESS PROSECUTORIAL OR JUDICIAL ERROR MANIFESTLY NECESSITATES A MISTRIAL.

The Illinois Appellate Court determined in this case that a mistrial declared sua sponte by the trial judge without any input from the defense would nevertheless be designated a mistrial

declared on motion of or with the consent of the defendant so as to allow retrial without a showing of manifest necessity. That conclusion was based upon two circumstances: the fact that Petitioner did not interpose a contemporaneous objection when the judge suddenly announced the mistrial (although he did object at the first opportunity presented thereafter), and the fact that at an earlier point in the trial, Petitioner had unsuccessfully moved for a mistrial based upon an incident separate from the incidents which the trial judge identified as his reasons for aborting the trial.

Certiorari should issue to review that ruling because it is at odds with the fundamental premise of the double jeopardy clause guaranteeing to criminal defendants the right to proceed to verdict before the original trier of

fact absent manifest necessity, and because the holding, if sanctioned, would require reconsideration and reformulation of the rules repeatedly enunciated by this Court for determining the circumstances under which a mistrial bars a subsequent prosecution. United States v. Perez, 9 Wheat 579, 6 L.Ed 165 (1824); Downum v. United States, 372 U.S. 734 (1963); United States v. Jorn, 400 U.S. 470 (1971); Illinois v. Sommerville, 410 U.S. 458 (1973); Oregon v. Kennedy, 456 U.S. 667 (1982).

The record of the trial proceedings in this cause demonstrates that during a recess in the testimony of one of the State's witnesses, Officer Hutchings, the prosecutor was observed to be conferring with the witness, and the defendant brought that fact to the trial judge's attention. The judge questioned the prosecutor about his conversation

with Officer Hutchings. Pursuant to the prosecutor's assurances that he had merely directed the witness' attention to certain reports without attempting to alter his account, the judge found that no prejudice had resulted. The judge added that if there was a motion for mistrial, it was denied. Acknowledging that he ws "doing this behind" the judge, defense counsel asked for a "few, quick rulings," and moved "for the mistrial [the judge] suggested." (R. 456-457) The judge said he had denied the motion, and the witness' testimony resumed.

The following court day, during a recess in the testimony of another State witness, Officer Bowden, the prosecutor was again observed to be conferring with the witness, and the defendant again brought the matter to the attention of the judge. Upon questioning by the

court, the prosecutor and Bowden gave differing accounts of the subject matter of their conversation. The judge then recessed proceedings, stating that he would review the Court reporter's notes on those differing accounts. Upon returning to the bench, without seeking input from either side, the judge sua sponte declared a mistrial based upon several "errors" that had crept into the record, including the prosecutor's conference with Bowden, purported discovery problems, and the State's delay in bringing the case to trial. (R. 630-632) In the course of announcing the mistrial, the judge also announced that he was recusing himself, and he directed the parties to secure the assignment of a new judge. The transcript indicates that the proceedings on that date concluded when the judge finished speaking; at a

subsequent hearing, defense counsel asserted that the judge was walking out the door as he concluded his comments. (R. 644)

When the parties first appeared before the newly assigned judge, defense counsel stated his objection to the mistrial, and during arguments on the motion to bar retrial, he asserted without any dispute from the State that the suddenness with which the judge left the bence upon announcing the mistrial made it impossible for him to object at the time. (R. 644)

The Illinois Appellate Court found it appropriate to conclude that Petitioner had consented to the mistrial declared by the court by his failure to object while the judge announced the mistrial and as a result of his previously denied motion for mistrial based upon the prosecutor's recess

conversation with Officer Hutchings. People v. Lovinger, Appendix A, p. 12. As a result, the Court found that Petitioner could be retried without a showing of manifest necessity.

This Court has never held or even implied that the mere failure to object to a mistrial declared sua sponte by the court provides a basis for ascribing the mistrial to the motion or consent of the defendant. Inconsistent with any such theory is this Court's observation in United States v. Dinitz, 424 U.S. 600 (1976), that jeopardy issues are not governed by traditional waiver concepts. In jeopardy matters, the focus instead is on whether the defendant has retained primary control over the determination of whether to proceed before the original tribunal in the face of error, or to instead seek a second trial before a new trier of fact. United States v.

Dinitz; United States v. Jorn, 400 U.S. 470 (1971).

Courts of several other jurisdictions have declined to hold that failure to interpose a contemporaneous objection can subject a defendant to retrial absent a showing of manifest necessity. See Curry v. Superior Court, 470 P.2d 345 (Calif., 1970); Torres v. State, 614 S.W.2d 436 (Tex. Crim., 1981).

Even if the failure to object could be deemed critical in some case, the circumstances of this case render such a result untenable. The mistrial was announced suddenly, after a recess during which the court had ordered the prosecutor to secure certain police reports for Petitioner's counsel and during which the judge had said he would review the court reporter's notes on the dispute over the conversation between

the prosecutor and his witness. Prior to the recess, no one had even mentioned mistrial as a possiblity. In announcing immediately after the recess that he had determined to declare a mistrial, the judge did not profess any interest in the opinions of the parties on the propriety of that action. Instead, he directed the parties to secure the assignment of a new judge and left the bench as he completed his remarks.

Under those circumstances, ascribing any unfavorable significance to the Petitioner's failure to object is entirely unjustified. In United States v. Jorn, 400 U.S. 470 (1971) this Court was confronted with similar circumstances in that the judge, after indicating his dissatisfaction with the assertions that certain government witnesses had properly been warned of their privilege against

self-incrimination, sua sponte declared a mistrial without seeking input from either party. This Court ascribed no significance to the fact that the defense had not managed to interpose an objection, and instead observed:

> ...the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so.

United States v. Jorn, 400 U.S. 470, 487. This Court treated the judge's abruptness and apparent disinterest in input from the parties as indicative of his failure to exercise a sound discretion to assure that manifest necessity for the mistrial existed. See also United States v. Sanders, 591 F.2d 1293 (9th Circ., 1979).

The only apparent difference between this case and Jorn is that

Petitioner here had made an unsuccessful motion for mistrial at an earlier point in the trial. The Appellate Court seizes upon that fact, and without stopping to question whether that prior motion had any impact whatsoever on the judge's sua sponte decision to abort the trial, the Court uses it as cause to analogize to several cases from other State and Federal jurisdictions. People v. Lovinger, Appendix A, pps. 10-11. In each of those cases, mistrials were ascribed to the motion or consent of the defendant where the defendants at some point moved to terminate the proceedings because of prejudicial error, where those motions were denied, but where the court subsequently determined that the errors which were the cause for the prior motions necessitated mistrials. See e.g. People v. Montlake, 172 N.Y.S. 102 (1918) - defendant moved for

mistrial because of inflammatory arguments by the prosecutor during closing argument; the court denied the motion when first made, but sua sponte declared a mistrial when the same comments were repeated; and State v. Wolak, 165 A.2d 174 (N.J., 1960), cert. denied 365 U.S. 822 (1961) - defendant moved for a mistrial because of an inflammatory demonstration orchestrated by the prosecutor; the judge denied the motion, but later said he had reconsidered and without objection by the defendant, said he would "grant the motion made on behalf of the defendant for a mistrial." 165 A. 2d 174, 175. See also People v. Bowman, 194 N.W. 2d 36 (Mich., 1971); Kamen v. Gray, 220 P.2d 160 (Kan., 1950) cert. denied, 340 U.S. 890 (1950); Sedgwick v. Superior Court, 584 F.2d 1044 (D.C. Cir., 1978), cert. denied, 439 U.S.1075 (1979).

In each of the above cases, the defendant's had, at one time during the trial, asked the judge to terminate the proceedings for the same reason that prompted the judge to do just that. In this case, however, petitioner never asked for a mistrial for any of the reasons given by Judge Hoogasian when he decided to abort the trial.

The distinction is critical because, as noted above, the fundamental consideration for purposes of the double jeopardy clause is that the defendant retain primary control over the course to be followed in the event of prosecutorial or judicial error. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267, 275 (1976). He can seek termination of the trial and the opportunity to proceed before a new tribunal if he judges the error to be sufficiently prejudicial, or

he can insist upon his right to proceed before the original trier of fact if he believes that he can still obtain a fair trial. United States v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971).

Where the defendant has once asked the judge to abort the trial because of a particular error, and where he subsequently declines to object when the court grants the relief he sought for the reasons he sought it, it is fitting to conclude that the defendant has retained the control to which he is entitled under the double jeopardy clause. The same conclusion is not possible where, as in this case, the judge grants a mistrial at some later point in the case without any input from the defendant for reasons other than the one that prompted the defendant to ask for a mistrial. Under those

circumstances, it is the judge and not the defendant who is controlling the determination of whether the case will proceed to verdict before the original trier of fact, and under those circumstances, the determination that the original tribunal cannot give the defendant a fair trial must be supported by manifest necessity.

The Appellate Court purported to acknowledge the potential for abuse presented by its holding in quoting the following remarks from People v. Bowman, 194 N.W.2d 36, 40 (Mich., 1971):

> "We acknowledge the merit in the defendant's fear that by holding that a denial [of the prior motion] has no effect, any motion made by a defendant might be granted to his detriment at some later stage of the proceedings when his fortunes have changed. This, if allowed, would certainly dampen the efforts of the defendant's counsel to protect his client, making him fearful

> that any motion for a mistrial, though denied, may return to haunt him when the court decides to reverse its decision (perhaps because a prosecutor's case has not gone as well as it might have), and force the defendant into a second trial on a theory that the court was only finally doing what the defendant asked him to do." (194 N.W.2d 36, 40.)

But the problems posed by the Bowman Court do not equal those engendered by the extension of that Court's rationale to cases where the mistrial motion was based on different grounds than the mistrial that was declared.

Under Bowman and like decisions, the record uncontrovertably demonstrates that the defendant once judged that the incident prompting the mistrial made his chances for a fair trial before the original tribunal questionable, and the only question remaining open is whether he has altered that judgment. Under the

holding in this case, a defendant's assessment of the effect of the incident that prompts the mistrial on his chances of securing a fair verdict has no significance. So long as he once voiced a desire to abort the proceedings and no matter what has transpired since, the judge can declare a mistrial without seeking the defendant's input, and retrial can be had without regard to whether the mistrial was manifestly necessary.

Moreover, this case presented a prime example of the dangers predicted in Bowman. It is apparent from the record that defense counsel made the original mistrial motion as something of an afterthought, only after it was denied by the trial judge, and primarily as a means of protecting the record in the event some specific prejudice resulting from the prosecutor's

discussion with Officer Hutchings surfaced at some later point in the trial. As matters developed, it became clear that nothing the prosecutor had said to Hutchings, whether proper or improper, had cured the witness' memory lapses. Throughout his testimony subsequent to the mistrial motion, Hutchings continued to have difficulty in providing any consistent account of the comings and goings of the exhibits. Indeed, his confusion and inconsistencies prompted the judge to remark that the prosecution had some substantial problems with the chain of custody on the exhibits purportedly tested by the crime lab and purportedly containing unlawful controlled substances. (R. 502)

In light of Hutchings' continued difficulties and then Bowden's problems in recalling a date on which he

allegedly turned an exhibit over to Hutchings, it is apparent that even assuming petitioner actually wanted a mistrial when the Hutching incident arose, his fortunes had changed and he had substantial cause to insist upon his right to proceed to verdict when the trial was aborted by the judge. Under the circumstances, it was particularly unfair for the Appellate Court to pretend (as Judge Hoogasian did not) that the trial judge was only doing what the defendant had asked him to do.

Other theoretical problems are posed by the Illinois Appellate Court's disposition of this case. As that Court acknowledged, and as this Court has recently reaffirmed, when a mistrial is ascribed to the request of the defendant, retrial can be had unless the defendant can show prosecutorial overreaching by demonstrating that the

prosecutor goaded the defendant into seeking the mistrial with the intent of subverting the defendant's jeopardy rights. Oregon v. Kennedy, 456 U.S. 667 (1982). When the mistrial is declared on grounds different from those that prompted the defendant's motion, several questions unaddressed by the Illinois Appellate Court are posed. Should the court inquire whether the prosecutor goaded the defendant into making the motion or should the focus be instead on the prosecutor's intent as to the incident that prompted the judge to abort the trial? If the latter, musn't the question be altered so that one looks to whether the prosecutor was goading the judge into action rather than the defendant? After all, the defendant has made no motion which the prosecutor can be deemed to have provoked even if his goal was to secure

a mistrial and the chance to retry the case before a more sympathetic tribunal.

The Appellate Court in this case seemingly focused upon only the question of whether the prosecutor was trying to goad the defendant into seeking a mistrial when he conferred with Bowden during the recess. People v. Lovinger, Appendix, p. 12. Petitioner had argued to that Court and would still maintain that whatever the actual impropriety of the conference with Bowden or the actual prejudice threatened, it was highly likely to provoke a mistrial. Judge Hoogasian had so many times warned the prosecutor not to talk to his witnesses and warned that prohibited discussions might result in mistrial, that the prosecutor had to know that if he wanted a mistrial, all he had to do to goad the judge into it would be to talk to a witness.

Although the Appellate Court declined to address the legal question of whether there was manifest necessitv for this mistrial, it did observe that "it is difficult to conceive how it could be thought that [the prosecutor's conversation with Bowman during the recess] would prevent a fair trial and a just verdict so that a mistrial would have to be declared." People v. Lovinger, Appendix, p. 12. Throughout this case, the State has never proposed a theory explaining why that conference or the purported discovery problems or the delay in bringing the case to trial would have prevented a fair trial so as to render the mistrial declared by the court manifestly necessary. In point of fact, whatever problems existed could and should have been cured by means short of aborting the proceedings. United States v. Jorn, 400 U.S. 470

(1971); People v. Phillips, 29 Ill.App.3d 529, 331 N.E.2d 163 (1st Dist., 1974) Had the case been properly addressed as one in which the mistrial was declared on motion of the court and not on motion of the defendant, it is apparent that retrial should have been barred.

The Appellate Court's characterization of the mistrial in this case as one declared with the Defendant's consent is factually inaccurate and legally unsound. This Court should grant review to reclarify, consistent with the Fifth Amendment and this Court's decisions, that a mistrial cannot be imputed to the defendant where he has been given no opportunity to influence the court's decision to abort the trial. United States Constitution, Amendments V & XIV; United States v. Dinitz, 424 U.S. 600 (1976); Downum v.

United States, 372 U.S. 734 (1963); United States v. Jorn, 400 U.S. 470 (1971); Oregon v. Kennedy, 456 U.S. 667 (9182).

CONCLUSION

For the reasons stated, Petitioner, Jeffrey Lovinger requests, that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court sanctioning Petitioner's retrial.

Respectfully Submitted,

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APPENDIX

A

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JEFFREY LOVINGER, Defendant-Appellant.

Second District No. 83—330

Order affirmed and cause remanded.

Opinion filed January 17, 1985.

CRIMES AND PUNISHMENT (§43)—*sua sponte declaration of mistrial by trial judge deemed pursuant to defendant's consent and thereby avoided double jeopardy bar to retrial—drug offenses.* Trial judge's *sua sponte* declaration of mistrial before abruptly leaving courtroom was deemed to be pursuant to defendant's consent and not intentionally provoked by prosecutor's misconduct, thereby avoiding double jeopardy bar to retrial, where defendant earlier in bench trial unsuccessfully moved for mistrial because of prosecutor's communication with witness during recess, mistrial occurred after defendant brought to judge's attention second recess conversation with another witness, and defendant neither requested leave to state objection to mistrial nor moved for reconsideration of judge's declaration after latter left courtroom.

Appeal from the Circuit Court of Lake County; the Hon. Jack Hoogasian, Judge, presiding.

Robert P. Will, Jr., of Waukegan, and Mary Robinson, of Elgin, for appellant.

Fred L. Foreman, State's Attorney, of Waukegan (Phyllis J. Perko and Marlene V. Newton, both of State's Attorneys Appellate Service Commission, of counsel), for the People.

JUSTICE SCHNAKE delivered the opinion of the court:

This is an interlocutory appeal by the defendant, Jeffrey Lovinger, under Supreme Court Rule 604(f) (94 Ill. 2d R. 604(f)), from an order of the circuit court of Lake County, denying his motion to dismiss the charges against him based on former jeopardy.

The defendant was originally charged by information with the following three illegal drug deliveries: (1) October 15, 1979, delivery of less than 30 grams of a substance containing cocaine (Class 2 felony) (Ill. Rev. Stat. 1979, ch. 56½, par. 1401(b)); (2) October 16, 1979, delivery of 30 grams or more of a substance containing cocaine (Class X felony) (Ill. Rev. Stat. 1979, ch. 56½, par. 1401(a)(2)); and (3) October 16, 1979, delivery of more than 2.5 but not more than 10 grams of a substance containing cannabis (Class A misdemeanor) (Ill. Rev. Stat.

1979, ch. 56½, par. 705(b)). The case proceeded to a bench trial, and the trial judge declared a mistrial on his own motion during the State's case in chief. The case was then assigned to another judge, who denied the defendant's motion to dismiss based on former jeopardy. A detailed statement of the proceedings at trial is essential to an exploration of the issue of double jeopardy.

The defendant, Jeffrey Lovinger, was arrested on October 16, 1979, and was subsequently charged by information with delivering cocaine to an undercover police officer named Paula Riccio on October 15, 1979, and delivering cocaine and cannabis to Riccio on the following day.

On September 7, 1982, prior to trial, an order was entered on the defendant's motion, requiring that "the evidence" in the case be transported to a laboratory in Glen Ellyn, and that "a portion of said evidence be analyzed [by the defendant's expert] in the presence of a chemist from the Northern Illinois Police Crime Laboratory." As explained hereinafter, it became apparent at trial that this order was not complied with.

The matter proceeded to a bench trial on November 3, 1982. On that date the defendant filed his response to the court's earlier order for discovery, indicating his intention to raise the defense of entrapment.

Paula Lemke, formerly Riccio, the undercover police officer named in the information, testified for the State about the deliveries on October 15 and 16, and about her part of the chain of custody regarding the alleged controlled substances. According to Lemke, the delivery on October 15 was made in Lovinger's car which was parked in the parking lot of Goodman's Restaurant in Highland Park. She and Lovinger had just lunched together in the restaurant. They had previously arranged to meet at Goodman's in order to consummate the drug transaction. The delivery on October 16 took place in Lovinger's apartment in Waukegan. Arrangements for this transaction were made during the earlier delivery at Goodman's and in subsequent telephone conversations. Immediately after the transaction on October 16, Lovinger was arrested along with a codefendant not involved in this appeal, Stanley Blackowicz. The purported cocaine delivered on October 15 was contained in a plastic bag identified by Lemke as part of People's exhibit No. 1. The purported cocaine delivered on October 16 was contained in three plastic bags which she identified as People's exhibits Nos. 2A, 2B and 2C. The alleged marijuana delivered on October 16 was contained in a plastic bag which was part of People's exhibit No. 3.

During cross-examination of Lemke, it became apparent that the court's order of September 7, 1982, regarding analysis of the evidence by the defendant's expert, had not been carried out. The expert would not analyze the evidence in the presence of a chemist from the crime lab, apparently because he wanted to dry the substances overnight to determine their weight accurately. Subsequently, without any modification of the prior court order regarding analysis of the evidence by the defendant's expert, samples from the exhibits were taken to the defendant's expert and tested. Lemke testified, however, concerning the purported cocaine delivered on October 16, that the sample was taken from only one of the three plastic bags. On motion of the defendant the bench trial was continued so that the defendant's expert could analyze the substance in the other two plastic bags.

The bench trial resumed on Monday, January 31, 1983, and continued all that week and the first two days of the next. Lemke's cross-examination included questions about two other deliveries of purported cocaine by Lovinger to her on October 5 and 10, 1979. Presumably, these transactions were brought up by the defense with a view toward the anticipated entrapment defense. The purported cocaine delivered on October 5 and 10 was identified by Lemke as part of People's exhibit Nos. 4 and 5, respectively.

Other police officers testified about surveillance they conducted at the scenes of the transactions, the arrest of Lovinger and Blackowicz after the transaction on October 16, during which Blackowicz was observed trying to flush down the toilet the money Lemke paid for the substances, and the chain of custody concerning the exhibits. The State's chemist testified about his analysis of the evidence, and his findings supported the charges against the defendant. Most of the eight days of trial were spent on chain of custody.

During the direct examination of Officer Hutchings, evidence officer for the Waukegan police department, a discrepancy developed regarding the chain of custody of People's exhibit No. 1, the substance allegedly delivered on October 15. The court called a recess so that the prosecutor could "get [his] act together."

Following the recess, defense counsel informed the court that during the recess the prosecutor and the witness had been passing papers back and forth between them and had appeared to be discussing the case. Defense counsel stated that the prosecutor did not have a right to discuss the witness' testimony with him during a recess taken during said testimony. Defense counsel suggested that "the remaining testimony by this witness will have been tainted by the discussion."

The prosecutor told the court that he did not tell Hutchings how

to testify. In fact, he advised, he told Hutchings they could not discuss his testimony. The prosecutor simply asked for Hutchings' records, reviewed them, and asked Hutchings to review his records and to testify from memory.

The judge then stated that it was improper for the prosecutor to talk with his witness during the recess, but that any error was harmless because Hutchings had been referring to his records throughout his testimony. The judge concluded his remarks by saying, "[T]here will be no further conversation, and if there is a motion for mistrial, that motion is denied." Defense counsel then moved to have Hutchings' testimony stricken, and to bar Hutchings from testifying further. When these motions were denied, defense counsel moved for a mistrial, which motion was also denied, and Hutchings' testimony continued. Prior to an overnight recess during his direct examination, the court admonished Hutchings not to discuss his testimony with any lawyers or anyone else because "we don't want any mistrial to occur."

Part of Hutchings' cross-examination concerned the method by which evidence was generally processed at the Waukegan police department. Hutchings testified as follows: There are evidence lockers located outside the booking room. Each locker has two keys, one kept in Hutchings' office, and the other kept in the locks of the lockers. When an officer seizes evidence, he places it in one of the lockers which he then locks. The officer then places the key through a slot into another locker which is kept locked. Hutchings keeps both keys for that locker. When Hutchings gets to work in the morning, he opens the locker with the keys, and then uses those keys to retrieve the evidence out of the other lockers. He then takes the evidence to his office. On redirect examination Hutchings stated, among other things, that it is possible for an officer to keep the key once he has placed evidence in a locker. Under those circumstances, Hutchings does not take the evidence out of that locker and into his office.

The State's next witness was Officer Bowden, who testified about the surveillance he conducted on the transactions on October 15 and 16, and about his part of the chain of custody of the physical evidence. During his direct examination he testified that he had handled the substances delivered on October 5, 10, 15, and 16, and in each case he received the evidence from Lemke and locked it in one of the evidence lockers described by Hutchings. Bowden, however, kept the key. He did not place it in the locker with the slot for keys described by Hutchings. In each case Bowden subsequently retrieved the evidence from the locker himself and gave it to the next person in the

chain of custody. Regarding the purported cocaine delivered on October 10, Bowden testified that he received it from Lemke and locked it in an evidence locker on October 10. On *the following day* he retrieved it and turned it over to Hutchings. (Hutchings had previously testified that Bowden gave that evidence to him on October 10.) The prosecutor then asked Bowden, "When did you turn it over to Officer Hutchings?" and Bowden replied that he thought it was the following day, but he would have to see his records to be sure. When the prosecutor asked him if there was anything that would refresh his recollection, defense counsel objected. The court told the prosecutor not to correct the witness and called a recess, stating "You [presumably Officer Bowden] don't talk with them [presumably the lawyers]. They don't talk with you about this case. Again, I'm going to advise, let's get everything in order."

Following the recess, defense counsel stated to the judge, "[O]nce again I am informed that [the prosecutor] has been talking to a witness." The judge asked the prosecutor if he had talked to Bowden, and the prosecutor first replied, "Not about this case, no." He subsequently told the judge that "[t]he only thing I said to him was, 'Do you have any police report on the 5th or 10th.' " During the recess, defense counsel had asked the prosecutor for the police reports concerning those dates. The prosecutor told the judge that he did not talk to Bowden about his testimony.

When Bowden entered the courtroom, the judge asked him if the prosecutor had talked with him during the recess. Bowden first told the court that he had not, and then said, "I told him that I wasn't pleased with the fact I was getting my butt chewed out. But that was it."

The defendant then testified to a third version of the conversation. He said that during the recess he overheard the prosecutor ask Bowden if he wrote any police reports concerning the 5th and 10th of October. Bowden replied that he was not sure whether he did or not. Lovinger subsequently heard something about the key to the evidence locker. Defense counsel had stated earlier that Lovinger told him that the prosecutor asked Bowden why he did not "follow the procedure with respect to that key," and that Bowden replied that he was "not supposed to use that key."

The court then asked the prosecutor to let him see the police reports from October 5 and 10, and the prosecutor replied that he did not have them. The court then ordered him to get the reports and called a recess.

Following the recess, the judge declared a mistrial on his own mo-

tion, stating:

"Gentlemen, at this time I want to put something on the record. I have not been satisfied with the way this case has been presented. First, I call to the attention of everybody in this courtroom that because of the laxity of the prior State's Attorney and his administration, there was nothing done to resolve this cause of action before a jury or bench trial because of the fact that this matter had occurred in 1979.

Secondly, I am concerned about the lack of discovery afforded the defense, pursuant to court order of Judge Doran, and even of this court.

Third, there was a failure to fully comply with the orders of the Court during trial regarding discovery. For example, I point out to my order of September 7th and the fact that a witness in this cause did remove portions from Group Exhibit No. 2, for identification, when I had ordered all of the exhibits to be taken to the defense chemist for purpose of analysis, pursuant to the order of discovery.

Fourth, I am very much concerned about what occurred early this afternoon in this courtroom. And this can be classified as either direct or indirect contempt, and I'm not going into that phase of it. Because of the talking about a pending matter with a witness who says he did not talk with the Assistant State's Attorney, and the Assistant State's Attorney saying to me that he did not talk with the witness, except for request by Bob Will, representing the Defendant, and then you changing your conversation after Lovinger under oath indicated certain things. And then you said something else contrary, and it's all on the record.

At this point in the trial, it is questionable, and I doubt whether discovery has been completed by the State to the defense.

And further it has been disclosed by the witness on the stand, when he said, 'I told him I was not pleased with the fact I was getting my butt chewed out, but that was it.'

I, as the Court, am wholly unaware of any—I'm sorry. I am only aware of a reprimand by anyone except my admonition to the witness, to the defense and to the Assistant State's Attorney, not to discuss this case with anyone. And prior to I continuing this matter this morning, I said, 'I am going to continue this case to 1:30. You don't talk with them; they don't talk with you about this case. Again, I'm going to advise, let's get every-

thing in order.'

I feel error has crept into this trial and it can only be resolved by me declaring a mistrial, which I so order, and I recuse myself from this case, and I order you to appoint another judge. Call the Clerk. And the only other judge that will not take this is Strouse, because he had recused himself before. And after it is assigned to another judge, I instruct you to go to the other judge and let him set it for trial. Bond is continued."

This statement of the judge concluded the hearing on that date.

The defendant subsequently filed a motion to dismiss based on former jeopardy. During argument on the motion defense counsel stated that he had received the police reports relating to October 5 and 10 prior to the mistrial declaration. When the judge declared the mistrial, as he made his final comments, he was "getting up and walking out the door, and that's the end of the proceedings, and that's how it terminated."

The judge to whom the matter was reassigned denied the defendant's motion to dismiss, found that there was a "manifest necessity" for the mistrial declaration, explaining, "The overriding thing of the trial judge, it appears to this court, is the fact of concern of error creeping into the record. This is repeated. An error, of course, would destroy a fair trial."

In his motion to dismiss because of former jeopardy, the defendant relied on the double jeopardy clause of the Federal Constitution, article I, section 10 of the Illinois Constitution, and section 3—4(a)(3) of the Criminal Code of 1961.

The Federal constitutional provision provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (U.S. Const., amend. V.) This provision is applicable to criminal proceedings in State courts. *Benton v. Maryland* (1969), 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056.

Article I, section 10 of the Illinois Constitution provides, in pertinent part, "No person shall *** be twice put in jeopardy for the same offense." Ill. Const. 1970, art. I, sec. 10.

Section 3—4(a)(3) of the Criminal Code of 1961 provides, in pertinent part:

"A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

* * *

(3) Was terminated improperly ***, in a trial before a

court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts ***." Ill. Rev. Stat. 1983, ch. 38, par. 3—4(a)(3).

On appeal the defendant bases his argument on the principles of double jeopardy as set forth in case law without making any distinctions between the provisions set forth above, presumably because there are none of any legal significance for purposes of this case.

The constitutional protection against double jeopardy includes the defendant's "valued right to have his trial completed by a particular tribunal ***." (*Wade v. Hunter* (1949), 336 U.S. 684, 689, 93 L. Ed. 974, 978, 69 S. Ct. 834, 837.) This right, however, is not absolute and "must in some instances be subordinated to the public's interest in fair trials designed to end unjust judgments." (*Wade v. Hunter* (1949), 336 U.S. 684, 689, 93 L. Ed. 974, 978, 69 S. Ct. 834, 837.) The standard for determining whether a defendant may be retried following declaration of a mistrial over his objection is whether there was a "manifest necessity" for the mistrial declaration. (*Arizona v. Washington* (1978), 434 U.S. 497, 54 L. Ed. 2d 717, 98 S. Ct. 824.) This standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." (*Illinois v. Somerville* (1973), 410 U.S. 458, 462, 35 L. Ed. 2d 425, 429, 93 S. Ct. 1066, 1069.) As a general matter, however, a trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. (*Illinois v. Somerville* (1973), 410 U.S. 458, 464, 35 L. Ed. 2d 425, 431, 93 S. Ct. 1066, 1070.) If the problem giving rise to the mistrial declaration could have been adequately corrected short of aborting the proceeding, however, the standard of "manifest necessity" has not been met, and retrial is barred. *People v. Phillips* (1975), 29 Ill. App. 3d 529, 331 N.E.2d 163.

Where a defendant asks for or consents to the declaration of a mistrial, different principles come into play. (*Oregon v. Kennedy* (1982), 456 U.S. 667, 72 L. Ed. 2d 416, 102 S. Ct. 2083; *People ex rel. Mosley v. Carey* (1979), 74 Ill. 2d 527, 387 N.E.2d 325, *cert. denied* (1979), 444 U.S. 940, 62 L. Ed. 2d 306, 100 S. Ct. 292.) Under such circumstances, retrial is barred only if the conduct giving rise to the mistrial declaration was intended to provoke a mistrial. *Oregon v. Kennedy* (1982), 456 U.S. 667, 679, 72 L. Ed. 2d 416, 427, 102 S. Ct. 2083, 2091.

The defendant in the instant case argues that he did not consent

to the mistrial and that there was no manifest necessity for the mistrial declaration, because the concerns cited by the trial judge when he declared the mistrial either had been or could have been adequately corrected with less drastic means.

The State, however, referring to the motion for mistrial made by the defendant during Hutchings' testimony (which motion was denied), and the defendant's failure to object when the judge declared the mistrial, maintains that the defendant consented to the mistrial declaration. The State also argues that the conduct of the prosecutor which caused the mistrial declaration was not intended to provoke a mistrial. Alternatively, the State contends that if the defendant did not consent to a mistrial, it was justified under the manifest-necessity standard.

In reply, the defendant maintains that silence in the face of a *sua sponte* declaration of mistrial by the court does not constitute consent. He maintains that he had no real opportunity to object because the judge "physically left the bench as he uttered those orders." Alternatively, he maintains that, if he did consent, retrial should be barred anyway because the prosecutor's conduct, in speaking to the witness Bowden during the recess, was intended to provoke a mistrial so that the State would have another opportunity to try the case.

The parties have not cited, nor do we find, any Illinois cases on the question of whether a defendant's mere silence or failure to object amounts to consent to a mistrial declared on the court's motion, such that retrial is not barred absent prosecutorial or judicial conduct intended to provoke the mistrial. (See *People v. Bean* (1975), 26 Ill. App. 3d 1090, 325 N.E.2d 679, *aff'd on other grounds* (1976), 64 Ill. 2d 123, 355 N.E.2d 17.) There appears to be a split of authority on this question in other jurisdictions. (Annot., 63 A.L.R.2d 782 (1959).) Failure to object would not amount to consent where there is no opportunity to interpose an objection. See *United States v. Jorn* (1971), 400 U.S. 470, 487, 27 L. Ed. 2d 543, 557-80, 91 S. Ct. 547, 558.

In this case, however, there was more than silence on the part of the defendant. He had previously requested a mistrial when the prosecutor spoke to one of his witnesses, Officer Hutchings, about chain of custody during a recess taken during Hutchings' testimony. At that time defense counsel maintained that "the remaining testimony by this witness will have been tainted by the discussion." Although that motion was denied, it was again defense counsel who, following a recess taken during Officer Bowden's testimony, brought to the court's attention that "once again *** [the prosecutor] has been talking to a witness [about chain of custody]." This discussion during the recess

was one of the principal reasons for the court's *sua sponte* declaration of a mistrial. Under such circumstances, there are cases, not cited by the parties, that suggest that failure to object does amount to consent.

The case most similar to that before us is *People v. Montlake* (1918), 184 App. Div. 578, 172 N.Y.S. 102.There the defendants were charged with grand larceny in the first degree. A first trial ended in a mistrial because the prosecutor referred to defense counsel as the attorney for the "pickpocket trust" and a pickpocket himself. On the first occasion of such remarks, the defendants moved for a mistrial, which motion was denied, and the defendants excepted. On the second occasion they protested the remarks but did not move for a mistrial. On the third and final occasion, which was more flagrant than the others, the court declared a mistrial on its own motion without objection by the defense. The reviewing court concluded that the mistrial was declared with the defendant's consent, stating:

> "I think that [the court's] such action may well be regarded as a somewhat belated granting of defendants' said former motion for that relief. Defendants' exception to the denial of that motion still stood upon the record, and I think that defendants' counsel should then in clear terms have withdrawn that motion if he did not wish it granted." 184 App. Div. 578, 582, 172 N.Y.S. 102, 105.

More recently in *State v. Wolak* (1960), 33 N.J. 399, 165 A.2d 174, *cert. denied* (1961), 365 U.S. 822, 5 L. Ed. 2d 701, 81 S. Ct. 710, the defendant was charged with first degree murder. His first trial resulted in a conviction which was reversed on appeal. During his retrial, the prosecutor asked two witnesses to take the gun used in the killing, and to point it at him as the defendant had allegedly pointed it at the victim. The prosecutor then called the widow of the victim and directed her to hold the gun, stand up like the defendant had, and point it at anyone in the courtroom as if he were her husband to show the aim. The witness pointed the gun at the defendant. The prosecutor then asked her to whom she was pointing the gun, and she replied, "Wolack [defendant] that --." (33 N.J. 399, 400, 165 A.2d 174, 175.) The defendant thereupon made a motion for mistrial, which was denied. The court instructed the jury to disregard the entire incident.

Three days later the court, outside the presence of the jury, informed counsel that it had decided to reconsider the defendant's motion for mistrial. Concluding that the demonstration by the victim's widow was prejudicial and would remain so regardless of his instructions to the jury, the judge ruled that he "must grant the motion

made on behalf of the defendant for a mistrial." (33 N.J. 399, 401, 165 A.2d 174, 175.) No objection was made by the defendant.

On appeal the defendant claimed that another retrial violated the double jeopardy provision of the New Jersey Constitution. The reviewing court disagreed, concluding that the defendant waived his right to go to verdict, stating:

> "The right of the trial court to reconsider and redetermine motions made during trial cannot be disputed. As in the instant case, the trial court did exactly that in [*Montlake*] ***." 33 N.J. 399, 402, 165A.2d 174, 175.

Two similar cases are *People v. Bowman* (1971), 36 Mich. App. 502, 194 N.W.2d 36, and *Kamen v. Gray* (1950), 169 Kan. 664, 220 P.2d 160, *cert. denied* (1950), 340 U.S. 890, 95 L. Ed. 645, 71 S. Ct. 206. See also *People ex rel. Roberts v. Orenic* (1981), 88 Ill. 2d 502, 431 N.E.2d 353 (defendant consented to mistrial where it was granted on his motion, even though, after it was declared, defense counsel stated he thought the mistrial should really be on the court's motion because the defense was not the cause of the mistrial); and *Sedgwick v. Superior Court for District of Columbia* (D.C. Cir. 1978), 584 F.2d 1044, *cert. denied* (1979), 439 U.S. 1075, 59 L. Ed. 2d 42, 99 S. Ct. 849 (defendant held to have consented to mistrial declared on court's own motion without objection where the defendant moved to dismiss the charge against him because of an alleged violation of his right to pretrial discovery, arguing that his right to a fair trial was seriously undermined by the discovery problem).

The court in *Bowman* included the following words of caution about imputing a mistrial declared by the court to a prior motion by the defendant for mistrial where such motion had been denied:

> "We acknowledge the merit in the defendant's fear that by holding that a denial [of the prior motion] has no effect, any motion made by a defendant might be granted to his detriment at some later stage of the proceedings when his fortunes have changed. This, if allowed, would certainly dampen the efforts of the defendant's counsel to protect his client, making him fearful that any motion for a mistrial, though denied, may return to haunt him when the court decides to reverse its decision (perhaps because a prosecutor's case has not gone as well as it might have), and force the defendant into a second trial on a theory that the court was only finally doing what the defendant asked him to do." (36 Mich. App. 502, 509, 194 N.W.2d 36, 40.)

The court in *Bowman* went on to conclude that such a situation was not presented in that case.

In the instant case, while the question may be a close one, this court holds that the defendant consented to the mistrial. The prior motion for mistrial was made by the defendant because the prosecutor talked to one of his witnesses, Officer Hutchings, about chain of custody during a recess taken during Hutchings' testimony. Defense counsel stated at that time his feeling that "the remaining testimony by this witness will have been tainted by the discussion." Moreover, the mistrial was declared by the court when defense counsel again brought to the court's attention another such discussion about chain of custody, this time between the prosecutor and Officer Bowden during a recess taken during the latter's testimony. Under these circumstances, and in light of the authorities cited above, it was incumbent upon defense counsel to object to the court's mistrial declaration, if, in fact, the defendant wanted to go to judgment. While the defendant argues that there was no real opportunity to do so, counsel could well have asked for leave to state his objection during the course of the mistrial declaration. Had he done so, the mistrial declaration could have been rescinded, as was done in *People v. Estrada* (1980), 91 Ill. App. 3d 228, 414 N.E.2d 512.

Additionally, because this was a bench trial, the defendant might readily, at a later date, have filed a motion asking the court to reconsider its mistrial declaration. Had the motion been granted, the trial could have been resumed.

It is apparent that counsel initially spoke to Bowden in an effort to satisfy defendant's request for police reports of the October 5 and 10 transactions. Although, if Lovinger's testimony is to be believed, the prosecutor exceeded the scope of what would clearly be a proper inquiry by asking Bowden why he did not follow the procedure described by Hutchings regarding the key to the evidence locker, it is difficult to conceive how it could be thought that such a question, if improper, would prevent a fair trial and a just verdict so that a mistrial would have to be declared. The record does not support a conclusion that the prosecutor was trying to provoke a mistrial because his case had been going badly. Compare *People v. Pendleton* (1979), 75 Ill. App. 3d 580, 394 N.E.2d 496.

In view of the foregoing, we do not reach the issue of "manifest necessity." The order of the circuit court of Lake County is therefore affirmed, and the cause is remanded for a new trial.

Affirmed and remanded.

HOPF and REINHARD, JJ., concur.

APPENDIX

B

61491

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217)782-2035

June 4, 1985

No. 61491 - People of the State of Illinois, respondent, v. Jeffrey Lovinger, Petitioner. Leave to Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Moran, J., took no part.

The mandate of this Court will issue to the Appellate Court on June 25, 1985.